NAME James H. Cunningham

PRISON NUMBER V-72323

CURRENT ADDRESS OR PLACE OF CONFINEMENT California Men's Colony State Prison, P.O. Box 8101 (6267x)

CITY, STATE, ZIP CODE

San Luis Obispo, Ca. 93409-8101

FILED

2008 MAR -7 AM 8:41

CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY RM DEPUTY

NUNC PRO TUNC

MAR -3 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

James H. Cunningham,
(FULL NAME OF PETITIONER)

PETITIONER

v.

John Marshall (Warden CMC-E)
(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS])

RESPONDENT

and

,

The Attorney General of the State of California, Additional Respondent.

Civil No 07 cv 2183 DMS (RBB)
(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

First Amended
PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

ORIGINAL

1. Name and location of the court that entered the judgment of conviction under attack: In the Superior Court of the State of California in and for the County of San Diego, East County Division
2. Date of judgment of conviction: January 6, 2005
3. Trial court case number of the judgment of conviction being challenged: No. SCE243538
4. Length of sentence: 12 years with 85%

5. Sentence start date and projected release date: September 12, 2004.
Date Sentenced March 9, 2005
Projected release Date 12/30/2014

6. Offense(s) for which you were convicted or pleaded guilty (all counts): Assault with a firearm Pen C§ 245(a)(2) Possession of a firearm by a felon Pen C§ 12021(a)(1) Possession of a Short barrelled Shotgun Pen C§ 12020 Personal use of a firearm Pen C§ 12022.5(a) and Prior Strike Conviction and Conviction of Serious felony Pen C§ 667(b) through (i) and subdivision (a).

7. What was your plea? (CHECK ONE)
   - (a) Not guilty ☑
   - (b) Guilty ☐
   - (c) Nolo contendere ☐

8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
   - (a) Jury ☑
   - (b) Judge only ☐

9. Did you testify at the trial?
   ☑ Yes ☐ No

DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the **California Court of Appeal**?
   ☑ Yes ☐ No

11. If you appealed in the **California Court of Appeal**, answer the following:
   - (a) Result: Judgement Affirmed
   - (b) Date of result (if known): March 9, 2006
   - (c) Case number and citation (if known): D046320
   - (d) Names of Judges participating in case (if known): Arron, J. Nares, Acting P.J. and O'Rourke, J.
   - (e) Grounds raised on direct appeal:
     See Attached Exhibit (A)

12. If you sought further direct review of the decision on appeal by the **California Supreme Court** (e.g., a Petition for Review), please answer the following:
   - (a) Result: Review Denied
   - (b) Date of result (if known): May 16, 2006
   - (c) Case number and citation (if known): D046320
   - (d) Grounds raised:
     See Attached Exhibit (B)

13. If you filed a petition for certiorari in the **United States Supreme Court**, please answer the following with respect to that petition: N A

(a) Result:

(b) Date of result (if known):

(c) Case number and citation (if known):

(d) Grounds raised:

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Superior Court**?

☒ Yes ☐ No

15. If your answer to #14 was "Yes," give the following information:

(a) **California Superior Court** Case Number (if known):

(b) Nature of proceeding: Motion

(c) Grounds raised: Motion and Request for jury's vouidre.

(d) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(e) Result: Recently Sent in to Superior Court.

(f) Date of result (if known): NA

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Court of Appeal**?

☐ Yes ☒ No

17. If your answer to #16 was "Yes," give the following information:

(a) **California Court of Appeal** Case Number (if known):

(b) Nature of proceeding:

(c) Names of Judges participating in case (if known)

(d) Grounds raised:

(e) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No

(f) Result:

(g) Date of result (if known):

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Supreme Court**?
☒ Yes ☐ No

19. If your answer to #18 was "Yes," give the following information:

(a) **California Supreme Court** Case Number (if known): S151640

(b) Nature of proceeding: Petition for writ of Habeas Corpus

(c) Grounds raised: ~~See attached Exh. D~~ Unknown
Petitioner has 5th grade education and apparently lost it.

(d) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No

(e) Result: Denied (See Exh. E)

(f) Date of result (if known): August 22, 2007

20. If you did ***not*** file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the **California Supreme Court**, containing the grounds raised in this federal Petition, explain briefly why you did not: Petitioner has a Fifth grade education and also suffers from mental disorders [illegible]. His appointed appellate counsel failed to raise Grounds (1-2) on direct appeal and petitioner was unable to acknowledge these additional claims set forth in Grounds (1-3) in the instant petition due to the main focal point of only having a Elementary Grade Education (See Exh G) In addition a fellow inmate found, drafted and wrote these claims (See Exh. G)

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?
☐ Yes ☑ No (If "Yes" Skip to #22)

(a) If no, in what federal court was the prior action filed? Southern District of California

(i) What was the prior case number? 06-cv-2168 JM (CAB)

(ii) Was the prior action (Check One):

Denied on the merits? ☐

Dismissed for procedural reasons? ☑ Dismissed without prejudice

(iii) Date of decision: December 8, 2006

(b) Were any of the issues in this current petition also raised in the prior federal petition?
☑ Yes ☐ No

(c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition? NA
☐ Yes ☐ No

Caution:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present ***all*** other grounds to the California Supreme Court before raising them in your federal Petition.
- **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.
- **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.

GROUNDS FOR RELIEF

22. **State** ***concisely*** **every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize** ***briefly*** **the facts supporting each ground.** (e.g. what happened during the state proceedings that you contend resulted in a violation of the constitution, law or treaties of the United States.) If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) GROUND ONE: (See Attached) Ground 1

Supporting FACTS: (See Attached)

Did you raise GROUND ONE in the California Supreme Court?

☐ Yes ☒ No Please See Request for Stay and Abeyance (Exh. H)

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): [illegible]

(2) Case number or citation: [illegible]

(3) Result (attach a copy of the court's opinion or order if available):

Ground 1 (Argument 2)

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights when his appellate counsel failed to raise an arguable issue on direct appeal that the trial court erred in failing to instruct the jury that 'General Intent' applied to the lesser included offense and erred in failing to instruct the jury that Caljic 9.00 'Assault Defined' is the same jury instruction for the lesser included offense of simple assault for Count 2 Assault with a firearm.

Supporting facts:

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his appellate Counsel failed to raise an arguable issue on direct appeal that the trial court prejudicially erred in failing to sua sponte instruct the jury that Caljic 3.30 'General Intent' applied to the lesser included offense Pen C § 240 and erred in failing to sua sponte instruct the jury that Caljic 9.00 'Assault Defined' is the same jury instruction for the lesser included offense of Simple Assault Pen C § 240 for Count 2 Assault with a firearm Pen C § 245(a)(2).

Ground 1 (Argument 1)

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights when his appellate counsel failed to raise an arguable issue on direct appeal that the trial court erred by instructing the jury on Caljic 17.01.

Supporting facts:

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his appellate counsel failed to raise an arguable issue on direct appeal that the trial court committed a reversable error by instructing the jury on Caljic 17.01 Verdict may be based on a number of unlawful acts.

Petitioner notes that on or about September 12, 2004 he was charged with an assault upon Jose Castro with a firearm, in violation of Penal Code Section 245(a)(2). (See CT 01 and CT 02)

Petitioner asserts that he went to trial and after all the evidence was presented, both the defense and the prosecution rested (See RT 265) The trial court then instructed the jury on several jury instructions (See RT 284-301) It wasn't until after both the prosecution and defense presented their closing arguments, that the trial court decided to give Caljic 17.01. (See RT 322; RT 323)

[redacted]

Ground 1 (Argument 1) Supporting facts Continued:

Petitioner* claims that he was denied his Constitutional rights to Know the charges against him, denied his Constitutional rights to a fair trial and deprived of due process of the law when the trial court prejudicially instructed the jury on Caljic 17.01 Verdict may be based on one of a number of unlawful acts. Petitioner bases this claim on the following facts: The trial court stated:

The Court: "And just for the record, there was one additional instruction that I just discussed with the attorney's that the Court will give. It is Caljic 17.01, and both attorney's have agreed to it."

"The defendant is accused of having committed the crime of Assault with a firearm in Count 2. The prosecution has introduced evidence for the purpose of showing that there is more than one act which a conviction on Count 2 may be based. Defendant maybe found guilty if the proof shows beyond a reasonable doubt that he committed anyone or more of the acts. However, in order to return a verdict of guilty to Count 2, all 12 jurors must agree that he committed the same act. It is not necessary that the particular act agreed upon be stated in your verdict." (See RT 322 (19-28))

"Now let me explaim what that means. You've heard evidence of certain events that occured inside the apartment. You've also heard evidence, I believe, of the defendant holding the gun in a certain manner while he was downstairs, I think,

Ground 1 (Argument 1) Supporting facts continued:

in the parking lot. The prosecution has argued that either one of the events could support a conviction for Count 2. What this instruction means is that all 12 of you just agree on which event or act occured before you can find the defendant guilty." (RT 323 (1-9)).

"If, for example, 6 jurors feels that what happened in the apartment is sufficient for a guilty of Count 2, but not what happened downstairs, and the other 6 think downstairs but not what happened up in the apartment, you can't go 6 plus 6 to make 12. All 12 of you have to agree that the defendant committed the same act in order to find him guilty of Count 2. You can't go 6 and 6 or 8 and 4 (See RT 323 (10-16)).

Petitioner proclaims that these are the judge's statements to Caljic 17.01. However, petitioner basis this argument on the following facts:

Petitioner make notice that he was only charged with one Count of assault upon Jose Castro with a firearm, in violation of Pen C § 245(a)(2) (See CT 01 and CT 02)

Petitioner claims that he was prejudicially denied his Constitutional rights to Know the charges against him, prejudicially denied his Constitutional right to confront and cross-examine the witness against him and prejudicially deprived of due process of the law when the

Ground 1 (~~Supporting facts~~) (Argument 1) Supporting facts Continued:

trial court prejudicially erred by instructing the jury on Caljic 17.01 "Verdict may be based on one of a number of unlawful acts." Petitioner basis this claim on the following facts:

Petitioner asserts that he exercised his Constitutional rights to a fair and impartial jury trial and after all the evidence was presented, bothe the defense and the prosecution rested their case. (RT 265). The trial court then instructed the jury on several jury instructions. (RT 284-301) It wasn't until after both the prosecution and defense presented their closing arguments, the trial court decided to give Caljic 17.01 jury instruction (See RT 322; RT323)

However, because the trial court instructed the jury on Caljic 17.01, gave the jury an alternate theory from which the petitioner could be found ~~or~~ 'Guilty' of for Count 2 Assault with a firearm, Pen C § 245(a)(2). The alternate theory was based on evidence the prosecution presented during trial, that the petitioner pointed the gun while down in the parking lot. Petitioner offers the following facts light most favorable to the prosecution's evidence:

Nina Talvera, testified that she lived in Bella Vista apartments (RT 168) and awoke on the night of Sep. 12, 2004,

Ground 1 (Argument 1) Supporting facts Continued:

to lots of yelling (RT 169). Talvera stated she lived on the ground level and was about 20 feet from the altercation (RT 170 (1-7)). Talvera next gave the following testimony:

"I saw Mr. Cunningham coming downstairs with something in his hand, and Chris was yelling at him, and they were yelling at each other. And, then, when Mr. Cunningham was on the ground, he had something at his side. I couldn't tell whether it was a bat. It looks like a bat from where I was. And he -- and then Chris, Mr. Knox, told him that he if he came up there again, he would kill him. And then Chris -- or -- sorry -- Mr. Cunningham yelled back at him, and he raised the -- what I thought was a bat -- in the air (See RT 170 (9-17)).

* Talvera told the police that it could have been a bat or a shotgun (RT 170 (18-27)). Talvera also stated that Cunningham was yelling back at (Christopher Knox) same type of things (See RT 172 (18-22)). (Deducted from the prosecution evidence, apparrently, since Chris, Mr. Knox told petitioner that he would kill him,* petitioner was also telling Christopher Knox that he would kill him). While, Talvera stated Castro was also standing and yelling from the top of the stairs (RT 173), Castro testified that he was in the room the entire time (RT 35 (17-25)

Additionally, the prosecution asked Talvera the following questions:

Ground 1 (Argument 1) Supporting facts continued:

By Mr. Link: (prosecutor) Q. "When Mr. Knox was yelling down into the parking lot, was the defendant yelling back"?
Talvera (the witness): A. "yes".
Mr. Link: (prosecutor) Q" At some point, you said he pointed whatever it was a bat or a shotgun, towards Mr. Knox"?
Talvera (the witness): A. "Up that way"
Talvera (the witness): A. "Up in that direction"
(See RT 174 (19-26))

In addition, the prosecution made the following statements to the jury during closing arguments:

"That's as far as just being down in the parking lot and pointing it upward and saying, 'I'm going to F-ing Kill you.' That's an assault with a deadly weapon" (See RT 308 (1-2)).

"We've got assault's with a deadly weapon all over the place." (See RT 308 (3-4)).

Thus, presented from the prosecution's perspective, and if the jury believed Talvera testimony there would be reasonable substantial evidence presented that, while petitioner was down in the parking lot, he pointed the gun toward Christopher Knox on the balcony and even though Christopher Knox and petitioner was yelling back an forth, they both threatened to *Kill each other. (Which would be consistent with a finding

Ground 1 (Argument 1) Supporting facts continued:

of an assault upon Chris Knox, in violation of Pen C§ 245 (a)(2).

Also not to go unnoticed, while the trial court stated "the victim in the case is Castro, not Knox" (RT 179 (18-19)), and "the People aren't going to be allowed to argue that he's a victim of any of these crimes" (RT 179 (21-22)) was an errouneously given statement and a prejudicial error on the part of the trial court for instructing the jury on Caljic 17.01 (See RT 322) and explaining to the jury that they could find the petitioner 'guilty' of an alternate theory as to Count 2 (See RT 323), (if the evidence shows that petitioner pointed the gun and was yelling threats at Christopher Knox (RT 174 (19-26)), while down in the parking lot, advertently or inadvertenly prejudicially made Christopher Knox an alleged victim, as to petitioner's Count 2 Assault with a firearm, in violation of Pen C§ 245(a)(2).

Petitioner asserts that the jury would have had to reject Castro's alleged assault and more than likely than not excepted the alleged assault while down in the parking lot because as Castro testified, [redacted] that on September 12, 2004, the day this incident occured he was taking medication (RT 42)

Ground 1 (Argument 1) Supporting facts continued

he was feeling confused (RT 42-43(1-8)), his memory was a little fuzzy and has a mental disorder (RT 48(15-22)). Castro testified, they call him 5150 (RT 49), he hears things, noise, a lot of yelling at him and "most importantly," People comes to Kill him (RT 50 (8-10)), similiar to the events that occured in the apartment (RT 50 (13-14)). Moreover, the jury would have had to reject Castro's testimony because the jury found petitioner 'not guilty' on Count 1 Residential Burgulary (See RT 336), so this was a close case and since Castro testified that petitioner busted / threw in the door (RT 30-31), had a short rifle (RT 31-32), put his hand on the trigger (RT 32), put the gun to Castro's throat (RT 32) and stated, I'll come back and Kill you all (RT 33 (1-19)). (All of which would have supported a guilty finding on Count 1 Residential Burgulary).

Therefore, for each of these foregoing reasons, petitioner argues that since the trial court instructed the jury on Caljic 17.01 (See RT 322-323), after both the defense and the prosecution rested their case (RT 265) prejudicially denied him of his constitutional rights to a fair trial and due process of the law because petitioner was never advised of the charges against him (that Christopher Knox was an alleged victim to Count 2 Assault with a firearm Pen C §

Ground 1 (Argument 1) Supporting facts Continued:

245(a)(2). Wherefore, at the very least, there was no time or opportunity to craft a defense, no opportunity to ~~craft~~ ~~[illegible]~~ consult with legal counsel for the purpose of participating in his own defense, or no opportunity to speak in his own defense, and thus, was taken by suprise by not only evidence offered at trial, but also by an errouneously given jury instruction Caljic 17.01, that was given by the trial Court. Petitioner also argues that, most importantly, since the trial court instructed the jury on Caljic 17.01 and prejudicially made Christopher Knox an alleged victim, denied petitioner his Constitutional rights to a fair trial, denied petitioner his Constitutional rights to confront and cross-examine the witness against him and deprived the petitioner of due process of the law

because "Christopher Knox" was never called

as a witness during trial (See RT 180 (4-6)),

and thus, reversal is highly, highly required!!!

Ground 1 (Argument 1) Supporting cases, rules or other authority:

1.) "Due process of the law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by suprise by evidence offered at his trial." [Citation]" (People v. Lohbouer, supra, 29 Cal.3d 364, 367-368, italics added)

2.) Provisions of the Penal Code which govern pleading of offenses (See, e.g., §§ 950, 952), ensures that the defendant recieves the notice which he is guaranteed by the Sixth and Fourteenth Amendment. (See People v. West, supra, 3 Cal.3d 595, 612; In re Hess (1955) 45 Cal.2d 171, 174-175 [288 P.2d 5].

3.) The confrontation clauses of both the federal and State Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend; Cal. Const. art. I, §15).

4.) The confrontation clause guarantees criminal defendants the right to cross-examination. (Davis v. Alaska (1974) 415 U.S. 308 315-316, 39 L.Ed. 2d 347, 94 S.Ct. 1105.).

5.) The right of an accused to due process of law's in essence, the right to a fair opportunity to defend against the State's accusations. (Chambers v. Mississippi (1973) 410 U.S. 284, 294 [35 L.Ed.2d 297, 308, 93 S.Ct. 1038.)

Ground 1 (Argument 1) Supporting cases, rules or other authority continued:

6.)* The right to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. (Mr Justice Black, writing for the Court in In re Oliver, 333 U.S. 257, 273, 92 L.Ed 682, 68 S.Ct. 499 (1948), identified these rights as among the minimum essentials of a fair trial:

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court - are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the * witnesses against him, to offer testimony, and to be represented by counsel."

(See also Morrissey v. Brewer, 408 U.S. 471, 488-489, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972); Jenkins v. McKeithen, 395 US 411, 428, 429, 23 L.Ed.2d 404, 89 S.Ct. 1843 (1969); Specht v. Patterson, 386 US 605, 610, 18 L.Ed 2d 326, 87 S.Ct. 1209 (1967).

Both of these elements of a fair trial are implicated in the present case.

Ground 1 (Argument 2) Supporting facts Continued:

Petitioner notes that he was charged in Count 2 Assault with a firearm in violation of Pen C§ 245(a)(2) (See CT 01 and CT 02). The trial court, prosecution and defense agreed to instruct the jury on simple assault Pen C§ 240, as a lesser included offense of Count 2 Assault with a firearm Pen C§ 245(a)(2). (See RT 274 (10-28); RT 275 (1-9)).

However, the trial court instructed the jury on Caljic 3.30 for Counts 2, 3 and 4, but upon further review of the petitioner's Reporter Transcripts, the trial court prejudically erred in failing to sua sponte instruct the jury on Caljic 3.30 'General Intent' element of the lesser included offense of Simple Assault Pen C§ 240 (See CT 39; See also RT 294 (1-10)).

Also not to go unnoticed, upon further review of the petitioner's Reporter's Transcript, the trial court prejudically erred in failing to instruct the jury that Caljic 9.00 'Assault Defined' jury instruction was the same jury instruction for Simple Assault Pen C§ 240. Petitioner makes this foregoing assumption on the following facts:

Ground 1 (Argument 2) Supporting facts continued:

1.) Calgic 9.00 jury instruction is both the jury instruction for Simple Assault Pen C § 240 and 'Assault Defined' for any assault. (See Calgic 9.00)

2.) Being that petitioner was charged with Count 2 Assault with a firearm Pen C § 245 (a)(2). (See CT 01 and CT 02), the trial court had to give Calgic 9.00 'Assault Defined jury instruction for Count 2 Assault with a firearm Pen C § 245 (a)(2) (See CT 44; CT 45; RT 295 (15-28); RT 296 (1-23); see also use note for Calgic 9.02 jury instruction)

3.) Moreover, when the trial court instructed the jury on the lesser included offense of simple Assault Pen C § 240 (See CT 51; CT 52; RT 299-301) the trial court prejudicially erred in failing to either sua sponte re-instruct the jury on Calgic 9.00 Simple Assault Pen C § 240 / Assault Defined, or at the minimum of minimums instructed the jury that the previously given Calgic 9.00 'Assault Defined' (See RT 295-297) applied to the lesser included offense of Simple Assault Pen C § 240 (See RT 299-301)

Petitioner proclaims that he was ~~[illegible]~~ deprived of his Constitutional rights because the jury was never instructed or alerted to the general principles of law relevant to the

Ground 1 (Argument 2) Supporting facts Continued:

the lesser included offense of simple assault Pen C§ 240, since the trial court gave no indication or even mentioned that the previously given Calgic 9.00 'Assault Defined instruction (RT 295-297) was the same exact jury instruction and elements for the lesser included offense Simple Assault Pen C§ 240 (See RT 299-301)

Petitioner claims that since the trial court erred in failing to sua sponte instruct the jury on the 'General Intent' element of the lesser included offense of Pen C§ 240 and erred in failing to sua-sponte re-instruct the jury on Calgic 9.00 Simple Assault Pen C §240 / Assault Defined, or at the minimum of minimums instructed the jury that the previously given 'Assault Defined' Calgic 9.00 jury instruction, was the same exact Jury instruction and elements for the lesser included offense Pen C§ 240, was not a harmless error. Had the jury been properly instructed on the foregoing jury instructions, elements and the general principles of law that is relevant to and governing the jury's proper understanding of the lesser included offense Simple Assault Pen C § 240, might have essentially tipped the scales in the petitioner's favor and the jury would have found in favor of the Petitioner on the lesser included offense of Simple Assault

Ground 1 (Argument 2) Supporting facts continued:

Pen C § 240.

Petitioner basis this claim on the following trial court's comment:

"Well, there is evidence, though, of the -- Down on the ground floor kind of waiving the rifle towards the people on the balcony. That might be considered, I suppose, simple assault, if he wasn't aiming at anyone". (See RT 274 (25-28)).

Therefore, petitioner argues that for each of these foregoing reasons the trial court's failure to sua sponte instruct the jury on the lesser included offense of Simple Assault Pen C § 240 for Count 2 Assault with a firearm Pen C § 245(a)(2), was not a harmless error and so painfully prejudiced the petitioner's ability to defend against the charges since the jury was never instructed on the necessary general principles of law that is governing the essential elements of the lesser included offense of Simple Assault Pen C § 240, so that the jury could arrive at a just verdict of Count 2 Assault with a firearm, and thus reversal is highly required.

Petitioner also contends that this error should have been raised by his appellate counsel on direct appeal. The duties which appointed

Ground 1 (Argument 2) Supporting facts continued:

appellate counsel must fulfill his or her obligations as a competent advocate include the duty to argue all issues that are arguable. However, due to the inexcusable failure of his appellate counsel to raise this crucial assignment of error that arguably might have resulted in reversal deprived the Petitioner of effective assistance of counsel on direct appeal.

Ground 1 (Argument 3)

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights when his appellate counsel failed to raise an arguable issue on direct appeal that the trial court erred in failing to sua sponte instruct the jury that 'General Intent' applied to Caljic 17.19 jury instruction, Personal use of a firearm enhancement allegation.

Supporting facts:

Petitioner contends that he was denied his Constitutional rights to effective assistance of counsel and deprived of due process of the law when his appellate counsel should have raised an arguable issue on direct appeal that the trial court erred and commited a reversable error by failing to sua sponte instruct the jury that Caljic 3.30 'General Intent' applied to Caljic 17.19, Personal use of a firearm enhancement allegation.

Petitioner notes that he was charged in Count 1 Residential Burgulary Pen C § 459 and Pen C § 460. Count 2 Charged Assault with a firearm Pen C § 245 (a)(2). Both Counts also alleged a Personal use enhancement allegation in violation of Pen C § 12022.5(a) (See CT 01 and CT 02).

Ground 1 (Argument 3) Supporting facts Continued:

Petitioner asserts that the trial court instructed the jury on Caljic 3.30 'General Intent,' for Count(s) 2, 3 and 4. (See CT 39; See also RT 294 (1-10). The trial court also instructed the jury on Caljic 17.19, for the personal use of a firearm enhancement allegation. (See CT 50; Pen C § 12022.5 (a); See also RT 298-299 (1-5)

However, upon further review of Petitioner's Reporter's Transcript, the trial court prejudically erred if failing to instruct the jury that Caljic 3.30 'General Intent' applied to Caljic 17.19, the personal use of a firearm enhancement allegation Pen C § 12022.5 (a), as alleged in Count(s) 1 and 2. (See CT 39; RT 294 (1-10); See also RT 284-301)

Wherefore, the trial courts failure to properly instruct the jury that 'general intent' applied to Caljic 17.19, the personal use of a firearm enhancement allegation Pen C § 12022.5 (a), deprived the petitioner of his Fifth Amendment right because it lightened the prosecution's burden of proof of every element of a crime beyond a reasonable doubt. In addition, Caljic 17.19, thus has a major gap because it makes no mention of the mental state which must accompany the menacing display varity of personal

Ground 1 (Argument 3) Supporting facts Continued:

use, in which Caljic 3.30 'General Intent' jury instruction must be given. Moreover, had the jury been instructed on the 'general intent' element in Caljic 17.19, as to the Personal use of an enhancement allegation Pen C § 12022.5(a), alleged in Count(s) 1 and 2, might have essentially tipped the scales in the Petitioner's favor and the jury would have the Petitioner 'not guilty' on the Personal use of a firearm enhancement allegation, that the jury found him guilty of in Count 2. (See CT 65; See also RT 336-339)

Therefore, Petitioner argues that the trial court's failure to sua sponte instruct the jury on the 'general intent' element of Caljic 17.19 Personal use of a firearm enhancement allegation Pen C § 12022.5(a), was not a harmless error, and thus, reversal is required.

Petitioner also contends that this error should have been raised by his appellate counsel on direct appeal. The duties which appointed appellate counsel must fulfill his or her obligations as a competent advocate include the duty to 'argue all issues that are arguable.' However, due to the inexcusable failure of his appellate counsel to raise this crucial assignment of error that arguable might have resulted in reversal deprived the

Ground 1 (Argument 3) Supporting facts continued:

Petitioner of effective assistance of counsel on direct appeal.

Ground 1 (Argument 4)

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights when his appellate failed to raise an arguable issue on direct appeal that the trial court erred in failing to sua sponte instruct the jury that Pen C§ 12022(a) or 12022.3 (b), was a lesser included enhancement of personally using a firearm Pen C§ 12022.5 (a).

Supporting facts:

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his appellate counsel should have raised an arguable issue on direct appeal that the trial court committed reversable error by failing to sua sponte instruct the jury that Pen C§§ 12022(a) or 12022.3 (b), was a lesser included enhancement of personally using a firearm Pen C§ 12022.5 (a), as alleged in Count(s) 1 and 2.

Petitioner notes that he was charged in Count 1 Residential Burgulary Pen C§ 459 and § 460. Count 2 charged Assault with a firearm Pen C§ 245 (a)(2). Both Counts also alleged a personal use of a firearm in violation of Pen C§ 12022.5 (a) (See CT01 and CT02)

Ground 1 (Argument 4) Supporting facts Continued:

Petitioner claims that the trial court should have on its own motion instructed the jury on the elements of Pen C § 12022 (a) or § 12022.3(b) because the jury had evidence deserving of consideration which would support a finding that the petitioner was only armed but did not use the weapon.

Wherefore, had the jury been instructed on the lesser included offense Personally armed with firearm Pen C §§ 12022(a) or 12022.3(b) for the Personal use enhancement allegation Pen C § 12022.5(a) that the petitioner was found 'guilty' of in Count 2 (See CT 65; See also RT 336-339), it is more likely than not that the jury would have opted to choose the lesser included enhancement allegation. Petitioner basis this argument on the following supporting testimony:

Petitioner testified that on September 12, 2004, he was employed as an automation general welder, and also did part time landscape work on the weekends. (See RT 210; RT 211, RT 216). He lived in Bella Vista apartments where he had lived for 16 or 17 months (See RT 211)

In September 2004, petitioner had Known the

Ground 1 (Argument 4) Supporting facts Continued:

Knoxes for about a year. (See RT 212) Petitioner would lend Rebecca Knox money, give her rides or anything like that (See RT 212; RT 213) Chris Knox and Petitioner were friends at first (See RT 213), but a few months before September 2004, Chris Knox threatened petitioner with a bat after petitioner confronted Rebecca Knox about putting a "bogus check" into petitioner's account (See RT 214; RT 215) Chris Knox then flew off the handle and threatened to hit petitioner with a bat. (See RT 215).

On September 12, 2004, petitioner worked a side landscaping job (See RT 215) He left home around 5:00 or 5:30 pm and returned around 10:00 or 10:30 pm. Before leaving, he saw Castro and Chris Knox. He did not know Castro and was not speaking with Mr. Knox. (See RT 216) When petitioner left, he left his windows open because it was over 100 degrees (RT 217; RT 233) When he returned home, he found his daughter's bike missing and someone had pried open the screen on his window. Some of his daughter's clothes were missing along with his cell phone and some personal checks (See RT 218) and petitioner was baffled about it. Petitioner then asked his neighbors in apartment number two if

Ground 1 (Argument 4) Supporting facts Continued:

they saw anyone (See RT 218) Petitioner then saw Rebecca, Knox, Castro and some other People on the balcony of the Knoxes apartment looking down on him (See RT 219) Petitioner asked them if they saw anyone and they got 'Sarcastic' with Petitioner. Petitioner then went inside his apartment to cool down (See RT 219)

Petitioner then went upstairs to the Knoxes apartment, looking for Rebecca Knox (See RT 219 (27-28)) and see if he could retrieve his property (See RT 220) Petitioner claimed that they had taken property in the past and when items were missing in the apartment complex, they were the first to contact (See RT 220) Petitioner also claimed that the knoxes' prior roommates took things from his balcony and out of his home prior to this (See RT 235 (15-18)). Castro then told petitioner that Rebecca Know would be back in about 15 minutes (See RT 221) When petitioner returned, he saw Rebecca and other people on the Knoxes balcony that were yelling at him (See RT 222) Petitioner then went inside his house and armed himself with his Shotgun (See RT 222) Petitioner had obtained the Shotgun 6 months earlier, after being jumped at the apartment complex, in which he was hit in the

Ground 1 (Argument 4) Supporting facts Continued:

~~rag~~ head, requiring 16 stitches (See RT 222 (19-23)) and was afraid of Chris Knox because of the bat and Chris threats (See RT 223)

Petitioner was told by Rebecca Knox that he could come up and look for his property (See RT 223) Petitioner did not go inside the Knoxe's apartment because Chris Knox came out with a bat. (See RT 223.) Petitioner said that he would get back at them at call the police. (See RT 224)

Petitioner denied hitting Castro, denied pointing a gun at Castro (See RT 224 (7-8)) and held the gun at his side the entire time (See RT 224 (9-11). Petitioner also denied ever pointing the gun at anybody in the apartment (See RT 224 (12-14); See also RT 224 (25-28); RT 225 (1-2)). Petitioner conetended that the only contact that he had with Castro was to ask him if he had petitioner's phone (See RT 225)

Petitioner then went downstairs and to his car. Meanwhile, Chris Knox was yelling threats at petitioner (See RT 226) Petitioner laid the gun on the floor board of his blue toyota truck. Then he

Ground 1 (Argument 4) Supporting facts Continued:

drove towards the freeway to head west (See RT 227), and planned to go to his mother's residence (See RT 256) When petitioner saw the police follow him, he threw the gun out the window because he was afraid of getting shot (See RT 227). Petitioner then immediately submitted to law enforcement authority and cooperated fully when he was stopped (See RT 159; 164)

Nina Talvera (prosecution witness) testified that she lived at Bella Vista apartment and awoke the night of September 12, 2004, to lots of yelling (See RT 168; RT 169) She saw appellant with something in his hands – either a gun or a bat (See RT 170). Chris Knox yelled at petitioner that he would Kill petitioner if he returned (See RT 170), petitioner raised the item in the air (See RT 170), pointing it straight up (See RT 172 (24-28)) He wasn't necessarily aiming it (See RT 173 (1-2) and Kept walking towards the parking lot. (RT 173)

William Bloomfield (prosecution witness) a "armed" security officier at the apartment complex (See RT 108), testified that he was on patrol the night of September 12, 2004; when he heard yelling, "he has a gun" (See RT 102) He then noticed petitioner had a gun down to his side (See RT 104 (19-28))

Ground 1 (Argument 4) Supporting facts Continued:

See RT 111 (23-28) and never threatened anybody with the gun (See RT 112 (1-26)) The petitioner then walked to his truck. (See RT 113).

Wherefore, Petitioner did not deny being armed with the firearm, petitioner asserts that he did not use the firearm. Moreover, Petitioner argues that his testimony was the only testimony offered in his defense to the altercation. However, Petitioner declares that when his testimony is taken in context along with the additional prosecution witnesses, is proof positive, that there is substantial evidence supporting the need for the trial court to instruct the jury, on the lesser included enhancement allegation Personally armed with a firearm Pen C § 12022(a) or Pen C § 12022.3(b)

Therefore, for each of these aforementioned reasons and foregoing testimony, the trial court's failure to instruct the jury on the elements that Pen C § 12022(a) or Pen C § 12022.3(b), was a lesser included enhancement for the Personal use of a firearm enhancement allegation Pen C § 12022.5(a), was not a harmless error, and thus reversal on the Personal use of a firearm enhancement allegation Pen C § 12022.5(a) is highly required.

Ground 1 (Argument 4) Supporting facts continued:

Petitioner also contends that this error should have been raised by his appellate counsel on direct appeal. The duties which appointed appellate counsel must fulfill his or her obligations as a competent advocate include the duty to 'argue all issues that are arguable'. However, due to the inexcusable failure of petitioner's appellate counsel to raise this crucial assignment of error that arguably might have resulted in reversal deprived the petitioner of effective assistance of counsel on direct appeal.

Ground 1 (Argument 5)

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights when his appellate counsel failed to raise an arguable issue on direct appeal that the trial court erred by wrongfully denying the defenses request to instruct the jury on Pen C§ 417.

Supporting facts:

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his appellate counsel should have raised an arguable issue on direct appeal that the trial court committed a reversible error by wrongfully denying the defenses request to instruct the jury on Pen C§ 417 as a lesser ~~instructed~~ included/related offense.

Petitioner notes that he was found guilty of Count 2 Assault with a firearm Pen C§ 245(a)(2). Count 3 Possession of a firearm by a felon and Count 4 Possession of a short barrelled shotgun Pen C§ 12020 Petitioner was found 'not guilty' of Count 1 Residential Burgulary Pen C§ 459 and 460.

Petitioner asserts that his defense counsel requested the trial court instruct the jury on Pen C§ 417, Branishing a firearm as a lesser related/included offense for Count 2 Assault with a

Ground 1 (Argument 5) Support facts continued:

firearm Pen C § 245 (a)(2) (See RT 278-281)

Unfortunately, the trial court refused to instruct the jury on Pen C§417, (See RT 279 (18-18) absent some stipulation. However, the prosecutor stated: "I'm not going to stipulate, as you said, to a lesser related offense." (See RT 282 (17-19)), Wherefore, the prosecutor further stated: "And I agree, if I stipulated to it, it would apply". (See RT 282 (28); 283)

Petitioner claims that the trial court committed a prejudicial error in refusing to instruct the jury on Pen C§417 as a lesser included/related offense to the charge of Assault with a firearm Pen C § 245 (a)(2) (See RT 278-281) Petitioner basis this claim on the following facts:

1.) Pen C § 417, Branishing a firearm is a lesser related offense to Count 2 Assault with a firearm Pen C § 245(a)(2).

2.) Even though the prosecutor must agree to stipulate to a lesser related offense, given the circumstances of this particular case; and including the fact that the prosecutor even stated: "And if I agree, If I stipulated to it, it would apply" (See RT 282 (28); RT 283) Should have prompted the trial court to instruct the jury on Pen C§ 417.

Ground II (Argument 5) Supporting facts continued:

3.) The defense ought not to be restricted by the stringent constitutional limits upon the prosecutor's right.

4.) Since the petitioner was found 'not guilty' of Count 1 Residential Burgulary (See RT 336), is proof positive that the jury believed that when, or if the petitioner entered the apartment he did not have the intent to commit an assault with a firearm, actual innocents.

5.) While, a misdemeanor Simple Assault instruction was given (RT 274-275); RT 299-301), as a lesser included offense of ~~Simple~~ Assault with a firearm, the lesser included offense of Simple Assault made no justification as to the firearm, and thus was excluded out of the relm of the jury and the jury was only left with the Assault with a firearm, beings that petitioner had a shotgun.

6.) There was substantial evidence in the record to support a finding on Pen C § 417 and petitioner theory of defense was consistent with only Branishing a firearm. Petitioner basis this claim on the following trial testimony:

Petitioner denied hitting Castro, denied pointing a gun at Castro (See RT 224(7-8)) and held the gun at his side the entire time (See RT 224(9-11)

Ground 1 (Argument 5) Supporting facts continued:

Petitioner also denied ever pointing the gun at anyone in the apartment (See RT 224(12-14); RT 224 (25-28); RT 225 (1-2)). Petitioner contended that the only contact that he had with Castro was to ask him if he had petitioner's phone (See RT 225).

Nina Talvera (prosecution witness) testified that she lived at Bella Vista apartments and awoke the night of September 12, 2004, to lots of yelling (See RT 168; 169) She saw petitioner with something in his hands - either a gun or a bat (See RT 170). Chris Knox yelled at petitioner that he would Kill petitioner if he returned (See RT 170), petitioner raised the item in the air (See RT 170), Pointing it straight up (See RT 172 (24-28)) He wasn't necessarily aiming it (See RT 173 (1-2) and Kept walking towards the parking lot (See RT 173).

William Bloomfield (prosecution witness) a 'armed' security officier at the apartment complex (See RT 108), testified that he was on patrol the night of September 12, 2004, when he heard yelling, "he has a gun" (See RT 102) He then noticed petitioner had a gun down to his side (See RT 104 (19-28)); RT 111 (23-28) and never threatened anybody with the gun (See RT 112 (1-26)). The petitioner then walked to his truck (See RT 113).

Ground 1 (Argument 5) Supporting facts Continued:

At trial, by petitioner's testimony in which he did not deny being armed with the firearm, petitioner raised the defense that he did not point or theaten anyone with the firearm at all. Moreover, petitioner argues that his testimony was the only testimony offered in his defense to the altercation. Here, petitioner declares that when his testimony is taken in context along with the additional prosecution witnesses, is proof positive, that there is substantial evidence presented in petitioner's defense, that he only committed a misdemeanor, a violation of Section 417, of the Penal Code (the drawing, exhibiting or using a firearm or other deadly weapon, and thus, under the circumstantes of the present case, it was error for the trial court to fail to instruct on it's own motion on Pen C§ 417.

Section 417 provides: Every person who, except in self-defense, in the presence of another person, draws or exhibits any [firearm, wheather loaded or unloaded,] in a rude, angry or threatening manner, or who in any manner, unlawfully uses the same in any fight or quarrel is guilty of a violation of Penal Code Section 417, subdivision [(a)] [(b)], a misdemeanor.

In order to prove this crime, each of the following elements must be proved:

1.) A person, in the presence of another person, Ground I (Argument 5) Supporting facts continued:

drew or exhibited a [firearm, wheather loaded or unloaded];

2.) The person was not acting in lawful self-defense; and

3.) That person did so in a rude, angry, or threatening manner;] [or]

3.) That person, in any manner, unlawfully used the [firearm] in any fight or quarrel].

As, the Supreme Court stated in Geiger: "[W]e find no reason in law, justice, or common sense why a jury that is not persuaded of the defendants guilt of the charged offense should not have the opportunity to find him guilty of a lesser related offense where, as here, the lesser offense is closely related to that charged, there is evidence of it's commission, and defendant's theory of defense is consistent with such a finding."

While, Petitioner acknowledged that Geiger, was over turned by Birks, Petitioner challenged Birks on several different reasons:

1.) The petitioner has no authority over what charges the prosecution intends to file.

2.) The prosecution "must prove their case beyond a reasonable doubt"

Ground 1 (Argument 5) Supporting facts continued:

3) Even though petitioner acknowledges that it is highly prejudicial to the prosecution, for a defendant to request a lesser related offense over the prosecution's objection, and for the fact that the prosecution has not had an opportunity to argue against the lesser related offense during trial, there must be existing law in between the extremes of People v. Geiger and People v. Birks. Petitioner basis this claim on each of the following facts:

1.) As in this case, instruction on Pen C § 417, was highly required because a procedure which affords the trier of fact an additional option when the evidence shows that the defendant is guilty of some crime but not necessarily the one charged, especially, in a situation like the present where the jury may be convinced a defendant did something for which he ought to be punished.

2.) Standing as it may be, the prosecutor must agree to stipulate to the lesser related offense for the jury to be instructed. Where as, in this particular case, the prosecutor stated that he was not going to stipulate to the lesser related offense, (See RT 282 (17-19)). But the prosecutor then agreed, that if he stipulated to Pen C § 417, it would apply. (See RT 282 (28); RT 283)

Ground 1 (Argument 5) Supporting facts continued:

4.) Thus, the petitioner is deprived of his right to a fair trial and deprived of due process because as in this case, the prosecutor agreed that if he stipulated to Pen C§417, it would apply (See RT 282(28); RT 283), but then the prosecutor declines to stipulate to the lesser related offense of Pen C§417 (See RT 282 (17-19), ~~deps~~ wrongfully deprived the petitioner of his right to present a defense, Where, as here Pen C§417 is closely related to Assault with a firearm Pen C§245(a)(2), there is substantial evidence of its commission, and defendant's theory of defense is consistent with such a finding. Additionally Pen C§417 is a misdemeanor, while Assault with a firearm Pen C§ 245(a)(2) ~~is~~ is a felony and carries 2, 3 or 4 years if convicted.

5.) Moreover, the defense ought not to be restricted by the stringent constitutional limits upon the prosecutor's right. because there is substantial risk of an unwarranted conviction which "dimishes the reliability of both the fact-~~All~~finding and the sentencing determination.

6.) Requiring related offense instructions allows "every material issue presented by the evidence to be determined. ~~TM~~

7.) In addition, the trial court failure to instruct the jury on lesser related offenses Pen C§417, as in this case, is also in conflict with pre-existing California, Federal and United States law, because the ~~[illegible]~~ defendant has a Constitutional right to instruct

Ground 1 (Argument 5) Supporting facts continued:

have the trial court instruct the jury on "every theory of the case that is supported by substantial evidence.

7.) Is the petitioner denied his Constitutional rights to a fair trial, to present a defense and deprived of due process of the law when the defense requests a lesser related offense, the prosecution declines to stipulate to the lesser related offense, but ~~admits~~ expressly admits that it would directly apply?

8.) Is the petitioner denied his Constitutional rights to a fair trial and deprived of due process of the law when the trial court fails to instruct the jury on Pen C § 417 as a lesser related offense, when this theory of the case is supported by substantial evidence?

9.) Should the trial court have the power to instruct the jury on it's own motion as to a lesser ~~included~~ Related offense when the theory of the case is supported by substantial evidence, the prosecutor declines to stipulate to the lesser related offense Pen C § 417, but expressly admits that if he would stipulate to it, it would directly apply?

Therefore, for each of these foregoing reasons, the trial court's failure to instruct the jury on Pen C§ 417 effectively removed from the jury one of the principle defenses presented (that at most the petitioner was only guilty of a violation of Pen C§ 417, a misdemeanor) constituted error in the circumstances of this case, and reversal is required.

Ground 1 (Argument 2)

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment right when his appellate counsel failed to raise an arguable issue on direct appeal that the trial court erred by instructing the jury on Caljic 2.02 and erred in failing to instruct the jury on Caljic 2.01 jury instruction.

Supporting facts:

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his appellate counsel should have raised an arguable issue on direct appeal that the trial court erred by instructing the jury on Caljic 2.02 Sufficiency of Circumstantial Evidence to prove specific intent or mental state and erred in failing to instruct the jury on Caljic 2.01 Sufficiency of Circumstantial Evidence.

Petitioner notes that he was charged in Count 1 Residential Burgulary Pen C§ 459 and 460. Count 2 charged Assault with a firearm Pen C§ 245 (a)(2). Count 3 charged Possession of a firearm by a felon Pen C§ 12021 (a)(1) and Count 4 charged Possession of a deadly weapon Pen C§ 12020. Both Counts 1 and 2 alleged a personal use of a firearm enhancement

Ground 1 (Argument b) Supporting fact Continued:

allegation in violation of Pen C § 12022.5(a) (See CT 01 and CT 02)

Petitioner asserts the trial court instructed the jury on Caljic 2.02 jury instruction for the specific intent in Count I (See CT 24; See also RT 288-289)

However, petitioner claims that the trial court should not have instructed the jury on Caljic 2.02 and should have instructed the jury on Caljic 2.01, for all petitioner's alleged charges. Petitioner basis this claim on the following facts:

The use notes to Caljic 2.02 states: "Caljic 2.01 and Caljic 2.02 should never be given together. This is because Caljic 2.01 is inclusive of all issues, including mental state and/or specific intent, where as Caljic 2.02 is limited to just mental state and/or specific intent. Therefore, they are alternate instructions. If the only circumstantial evidence relates to specific intent or mental state, Caljic 2.02 should be given. [I]f the circumstantial evidence relates to other matters, or relates to other matters as well as specific intent or mental state, Caljic 2.01 should be given and not Caljic 2.02 [Citations] (See use note to Caljic

Ground 1 (Argument b) Supporting facts Continued:

No. 2.02)(2006 ed.)

Wherefore, petitioner next claims that the circumstantial evidence in this case related to other matters, as well as specific intent, in which the trial court should have instructed the jury on Caljic 201, instead of Caljic 2.02. Petitioner basis this claim on the following facts: The trial court Stated: "I Guess the question is, is there any circumstantial evidence upon which the people are relying to establish any of the elements of the other counts charged? (See RT 267 (21-24)).

Mr. Link (the prosecutor): "Just the fact that he got into his car and sped away and threw the shotgun out the window, that all goes to the fact that he was trying to get away from the Police for a greater crime then just felony possession of a firearm (See RT 267 (25-28); RT 268)

Thus, the trial court refused to give Caljic 2.01 jury instruction. (See RT 268).

The prosecutor also relied on an inference of Petitioner's guilt, that petitioner fled from the scene during his closing argument to the jury (See RT 312; RT 313).

Ground 1 (Argument (b)) Supporting facts Continued:

Moreover, the trial court did instruct the jury on Caljic 2.52 Flight after crime (See CT 35; See also But as petitioner raised on direct appeal, that even if the flight instruction was appropriate, the pattern instruction required modification in this case. (See Case No. D046320)

Here, because flight after a crime is substantial circumstantial evidence that even if the trial Court did modify Caljic 2.52 instruction and instructed the jury it had to make a preliminary factual finding before it could infer any consciousness of guilt from petitioner's departure, since there was substantial evidence that showed an innocent reason for petitioner's depature and thus, warranting the need for Caljic 2.01

Futhermore, if the jury is permitted to find a consciousness of guilt based on circumstantial evidence, without making the requisite factual finding as set forth in Caljic 2.01, the prosecutions burden is lessoned and there is a danger of jury reliance upon an irrational or unjustified inference in violation of petitioner's Sixth and Fourteenth Amendment rights.

Additionally, a preliminary fact finding as set forth in Caljic 2.01, was very important because the

Ground 1 (Argument B) Supporting facts Continued:

Jury recieved evidence that petitioner's life had been threatened by Chris Knox.

Jose Castro (the alleged victim) testified for the prosecution that: From June 2004 through September 2004, he lived with Rebecca and Christopher Knox in their two bedroom apartment (See RT 27-28) During this time he had seen lots of arguments betweem Mr. Cunnigham (petitioner) and Mr. Knox (See RT 39 (10-19); RT 40 (1-2)) Where as Chris Knox threatened to kill petitioner ever since Castro moved into the Knoxes apartment (See RT 40) The Knoxes apartment was right upstairs from Petitioner's apartment. (See RT 27)

Rebecca Knox (prosecution witness) testified that Christopher Knox and Petitioner had previous arguments (See RT 80 (3-4)).

Nina Talvera (prosecution witness) testified that Chris Knox yelled at petitioner, that he would kill petitioner if he returned (See RT 70)

Petitioner testified that he was afraid of Chris Knox because of the bat and Chris threats (See RT 223) While Petitioner stated on cross

Ground 1 (Argument 6) Supporting facts Continued:

examination that he left to avoid arrest (See RT 207; RT 208), there was substantial evidence demonstrating that petitioner left for innocent (Safety) reasons and had nothing to do with consciousness of guilt inference permitted to the charged offenses. Also to the extent the jury might have inferred from the evidence that petitioner left because he was a felon in possession of a firearm, which would not have inferred guilt as to the major charges set forth in Counts 1 and 2. The jury could have also inferred from the evidence that the petitioner left to "cool down" (See RT 219), just as he left the Knoxes' apartment, and should be encouraged by the law, and certainly carried with it no consciousness of guilt.

Also, the 911 tape, which was played for the jury, and for which they had a transcript (See RT 76; RT 77), also revealed Chris Knox threatened to shoot petitioner in the face ["I'm going to shoot you in your face, you come up here again"] (See CT 9)

Where there is evidence that suggest a reason for a prejudicial circumstantial inference of guilt by flight other than consciousness of guilt, the trial court should have instructed the jury more

Ground 1 (Argument B) Supporting facts Continued:

specifically as to whether or not the evidence shows a consciousness of guilt, and what significance to attach to it, are questions of fact the jury must determine. Thus, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with theory that petitioner is guilty of the crime, but (2) cannot be reconciled with any other conclusion (See Caljic 2.01).

The trial court's failure to instruct the jury on Caljic 2.01, for all alleged counts, was an error of constitutional dimension in that it permitted the jury to infer guilt if it found that petitioner fled, without being instructed being instructed that it cannot be reconciled with any other conclusion, thereby lessoning the prosecution's burden and violating petitioner's right to trial by jury and due process. The permissible inference of guilt displayed by the trial court's failure to sua sponte instruct the jury on Caljic 2.01, improperly undermined petitioner's presumption of innocence on all alleged charges.

Petitioner leaving the scene where his life had been threatened by a yelling man armed with a bat,

Ground 1 (Argument B) Supporting facts Continued:

and threatening to shoot petitioner in the face, did not support the prejudicial circumstantial inference of guilt.

The trial court's failure to instruct the jury on Caljic 2.01, left the jury's attention directed toward's flight, and a highly prejudicial inference of guilt. Even though the instruction of flight was permissive, petitioner argues that flight was one type of substantial prejudicial circumstantial evidence of guilt that could "establish guilt" on all petitioner's alleged charges, and thus, warranting the need for the trial court to sua sponte instruct the jury on Caljic 2.01, instead of Caljic 2.02.

Petitioner next contends that the 911 tape which was played for the jury, and for which they had a transcript (See RT 76; RT 77; See also CT 8-14) was substantial circumstantial evidence supporting the need for the trial court to sua sponte instruct the jury on Caljic 2.01, as to all alleged charges. Petitioner basis this contention on the following facts:

1.) Petitioner proclaims that the 911 tape was circumstantial evidence because statements are

Ground 1 (Argument 1) Supporting facts Continued

nontestimonial when in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an on going emergency. As in this case.

2.) Futher, circumstantial evidence is defined in (Black's law dictionary) as 2. All evidence that is not given by testimony.

3.) The prosecution relied on the 911 tape "circumstantial evidence" during his closing arguments. (See RT 310-311)

4.) Also not to go unnoticed, the jury requested to re-hear the 911 Call "Circumstantial evidence" during deliberation. (See RT 334 (2-6))

5.) Indeed, the circumstantial evidence of the 911 tape was also susceptible of a reasonable interpretation and reconciled with other conclusions that pointed to the petitioner's innocence: Specifically, petitioner testified that he never pointed the gun at Mr. Castro (See RT 224 (7-8)); held the gun at his side the entire time (See RT 224 (9-11)) and never pointed it at anybody in the apartment (See RT 224 (12-14)); See also RT 224 (25-28); RT 225 (1-2))

Ground 1 (Argument B) Supporting facts Continued:

Petitioner hereby concludes that the 911 tape was also yet another type of substantial prejudicial circumstantial evidence of guilt that could "establish guilt' on all petitioner's alleged charges, which is proved by the fact the jury wanted to re-hear the 911 call during deliberation, and thus, warranting the need for the trial court to instruct the jury on Caljic 2.01 jury instruction.

Petitioner declares that, the fact that the trial court instructed the jury on Caljic 2.02 for Count 1 Residential Burgulary, and given the defense position, the jury returned a verdict of 'not guilty' on Count 1 (See RT 336 - 339), a reasonable person would only conclude that, had the jury been instructed on the general principles of Caljic 2.01 instruct, as to all Counts, might have essentially tipped the scales in the petitioner's favor, especially as to Count 2 Assault with a firearm Pen C §245(a)(2) and the jury would have also found the petitioner not guilty on Count 2.

In addition, not to belabor the point at all, the prosecution admitted that there was a lot of circumstantial evidence, during his closing arguments to the jury (See RT 311 (3-5)). The prosecution also

Ground 1 (Argument B) Supporting facts Continued:

told the jury that they would get a circumstantial evidence instruction (See RT 322 (4-10))

Therefore, Petitioner argues that because the 911 tape and flight risk was circumstantial evidence alone, which was relied upon for proof of guilt and this evidence was essential in order to procure his conviction (Which is proved by the fact the jury wanted to re-hear the 911 tape during deliberation), the trial court had a sua sponte duty to instruct the jury on Caljic 2.01 Sufficiency of Circumstantial Evidence -- Generally as to all alleged charges, was not a harmless error and so painfully prejudiced the petitioner's ability to defend against the the charges. Since the jury was never instructed on the necessary general principles of law that is governing circumstantial evidence and thus, reversal is required.

Petitioner also contends that this error should have been raised by his appellate counsel on direct appeal. The duties which appointed appellate counsel must fulfill his or her obligations as a competent advocate include the duty to argue all issues that are arguable. However, due to the inexcusable failure of his appellate counsel to raise this crucial assignment of error that arguably might have resulted in reversal deprived the petitioner of effective assistance of counsel on direct appeal.

Ground 1 (Closing Arguments)

Petitioner argues that there can be no doubt that the exclusion of each of the aforementioned jury instructions and elements was not a harmless error because it so painfully prejudiced the petitioner's ability to defend against the charges, since the jury lacked the general principles of law relevant to their very need of understanding the facts and laws in the course of this trial. Therefore, absent these many and various foregoing jury instructions, justice requires at the minimum of minimums, the verdict be put aside in this matter and the Petitioner be granted a new trial. But when each of these foregoing reasons are taken together, cumulatevely, justice require outright reversal.

(b) GROUND TWO: (See Attached) Ground 2

Supporting FACTS: (See Attached)

Did you raise GROUND TWO in the California Supreme Court?

☐ Yes ☒ No. Please see Request for Stay and Abeyance (Exh H.)

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): Petition for review

(2) Case number or citation: D046328

(3) Result (attach a copy of the court's opinion or order if available): Denied

Ground 2 (Argument 1)

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights when his appellate counsel erred in failing to raise an arguable issue on direct appeal that the trial court wrongfully denied the defense's motion for mistrial on the grounds that the prosecution wrongfully excluded several African American males out of the jury.

Supporting facts:

Petitioner contends that he was denied his Constitutional rights to effective assistance of counsel and deprived of due process of the law when his appellate counsel erred in failing to raise an arguable issue on direct appeal that the trial court wrongfully denied the defense's motion for mistrial on the grounds that the prosecution wrongfully used his peremptory challeges to exclude several Africam American out of the jury pool.

Petitioner asserts that on January 5, 2005, he went to trial on Four seperate Counts (See CT 01 and CT 02)

Petitioner claims that upon selecting a jury, the prosecution wrongfully dismissed several african americans out of the jury. Petitioner basis this claim on the following facts:

1.) Petitioner notes that he is an African American male.

Ground 2 (Argument 1) Supporting facts continued:

2.) The prosecutor wrongfully used his peremptory challenges by eliminating African American prosepective jurors. At one particular time excluding an African American male from the jury stating: "I don't like the way he was seating".

3.) The defense counsel objected and moved for an immediate mistrial. The trial judge overruled the objection and denied the defense's motion for mistrial.

However, petitioner does not have any Reporter's Transcripts to support this foregoing claim, due to the fact that his appellate counsel was ineffective for failing to augment the record of the jury's vouidre, and thus, petitioner never recieved the relevant transcripts of his jury's vouidre.

Wherefore, petitioner also claims that his appellate counsel should have requested that the record be augmented or corrected for each of the following reasons:

1.) Petitioner told his appellate counsel about what had transpired during his jury's vouidre, but obviously to no avail., the appellate counsel failed to agument the record and conduct a reasonable examination into the petitioner's alleged claim.

2.) When the appropriate record is missing or incomplete, counsel must see that the defect is remedied, by requesting augmentation or correction of the appellate record or by

Ground 2 (Argument 2) Supporting facts continued:

other appropriate means.

3.) Moreover, the defect in the record constituted the indaquate assistance of counsel on appeal, since counsel has not provided that advocacy which permits "full consideration and resolution" of the appeal, as required by the Constitution.

In addition, petitioner has attached a supporting declaration, specifically declaring that he did not recieve the Reporter Transcript's of his jury's vouidre (See Exh. D) and has since then requested the trial court provide him ~~of~~ with a free copy of the missing jury's vouidre portion of his Reporter Transcript's (See Exh. C)

Petitioner argues that for each of these foregoing reasons that are set forth above, the appellate counsel should have requested that the record be augmented or corrected to include the jury's vouidre of the petitioner's Reporter Transcripts.

Therefore, the appellate counsel's complete failure to augment the record to include the jury's vouidre, constituted inadequate assistance of counsel on appeal because the appellate counsel's failure to review the missing records, deprived the petitioner of his Constitutional right to complete and effective appellate review of his conviction. Had the appellate counsel augmented the

Ground 2 (Argument 2) Supporting facts continued:

record, and examined it for this alleged claim, she might have very well acknowledged this claim, found it to have merit and raised it on direct appeal.

Thus, due to the inexcusable failure to raise this crucial assignment of error on direct appeal that arguably might have resulted in reversal deprived the petitioner of effective assistance of counsel, and thus, should entitle the petitioner to a reversal; a recall of the remittitur, and allow the Petitioner's Reporter Transcript's to be reviewed and re-raised on direct appeal.

Ground 2

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights when he was denied the effective assistance of counsel on direct appeal because his appellate counsel was incompetent and ineffective when she failed to raise substantial allegations of error on direct appeal that arguably might have resulted in reversal.

Petitioner contends that he was denied his Constitutional right to effective assistance of counsel and deprived of due process of the law when his appellate counsel was ineffective for failing to raise substantial assignments of error, that Petitioner has set forth in Ground 1 that arguably might have resulted in reversal of his convictions.

On September 15, 2004, a Four Count information was filed charging Defendant/Petitioner, James A. Cunningham (Petitioner) with offenses occuring in San Diego County. Count 1 charged Petitioner with first degree burgulary of an inhabited dewelling in violation of Pen C§ 459 and 460. Count 2 Charged Petitioner with Assault with a firearm in violation of Pen C§ 245(a)(2). Count 3 charged

Ground 2 Supporting facts Continued:

Petitioner with unlawfully possessing a firearm as a felon in violation of Pen C § 12021 (a)(1). Count 4 charged petitioner with unlawfully possessing a Short-barreled shotgun in violation of Pen C § 12020 (a)(1). As to Counts 1 and 2, the information alleged that petitioner personally used a firearm within the meaning of Pen C § 12022.5 (a). The information also alleged petitioner had suffered a prior strike conviction and conviction of a serious felony within the meaning of Pen C § 667 (b) through (i) and subd, (a), respectively.

On January 6, 2005, a jury found petitioner 'not guilty' of Count 1 and found him 'guilty' of Counts 2 through 4. Petitioner waived a jury trial on the prior allegations. (See RT 335) On January 10, 2005, petitioner admitted the prior strike and prior serious felony allegations (see RT 411)

On March 9, 2005, the Court declined to dismiss petitioner's strike, and imposed the low term of two years on Count 2, doubled to four years based on petitioner's strike, plus a concurrent law term of 16 months, doubled to 32 months on Count 3, plus a low term on Count 4, which the

Ground 2 Supporting facts Continued:

the court stayed pursuant to Pen C § 654. The Court additionally imposed a low term, three-year enhancement for the firearm allegation, plus a five year enhancement for the serious prior, for a total prison term of 12 years (See RT 462-463; See also CT 93; CT 94)

On April 22, 2005, petitioner timely filed a notice of appeal (See CT 95.) Petitioner retained private counsel Susan K. Keiser for appellate counsel.

On September 19, 2005, appellate counsel filed petitioner's opening brief. Petitioner appellate Counsel raised three issues on direct appeal.

Argument #1: The trial court erred by denying appellant's request to cross-examine Rebecca Knox regarding her prior domestic violence accusations against her husband, Christopher Knox, which she later recanted, and thereby violated appellant's State and Federal Constitutional rights to present a defense and to cross-examine witness against him.

Argument #2: The trial court erred in giving

Ground 2 Supporting facts Continued:

Caljic Number 2.52, The statutory flight instruction, over defense objection thereby violating appellant's due process rights.

Argument 3: The court erred by denying the defense request to instruct with Caljic Number 12.50 when the evidence warranted such instructions, and the failure to instruct impermissibly reduced the prosecution's burden of proof and violated appellant's due process and trial rights. (See Court of Appeal Case No. D046320)

Petitioner has strong doubt that his appellate counsel adequately reviewed his Reporter's Transcript which is proven by the fact that petitioner raised the aforementioned legal arguments.

Moreover, judged by the foregoing criteria that the petitioner has set forth in each argument that the representation by his appellate counsel before the court of appeal was demonstrably Inadequate. As petitioner has set forth in this instant action, each of the counts on which petitioner was convicted is outright potentially vulnerable to legitimate and provacative

Ground 2 Supporting facts Continued:

appellate contentions that should have beyond a reasonable doubt, been manifest to alert any responsive attorney.

Wherefore, petitioner has catalogued the several arguments in ground 1, which his appellate counsel failed to raise on his behalf, each alone concludes that petitioner is likely to have obtained a reversal on appeal and which can only demonstrate and prove by substantial evidence that his appellate counsel did not render the thoughtful assistance to which he was entitled, and demonstrates that the petitioner was deprived of more than one crucial assignment of error that might have resulted in reversal.

In effect, petitioner was not represented by counsel, and was thus, clearly denied his right to effective assistance of counsel on direct appeal.

Therefore, petitioner argues that due to the inexcusable failure of his appellate counsel to raise these crucial aforementioned arguments that petitioner has set forth in Ground #1, on direct appeal that arguably might have resulted in reversal denied the petitioner of effective assistance

Ground 2 Supporting facts continued:

of Counsel at the crucial stage of his first and only appeal, and thus, this Honorable Court, should grant Petitioner's Writ of Habeas Corpus for this reason alone, recall the remittitur, appoint effective assistance of counsel and allow the petitioner to raise these arguable issues on direct appeal.